Nos. 2969 and 2970

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

San Francisco & Portland Steamship Company (a corporation), owner of the American Steamship "Beaver",

Appellant,

vs.

Leggett Steamship Company (a corporation), claimant of the Steam Schooner "Necanicum", her engines, boilers, boats, tackle, apparel and furniture,

Appellee.

No. 2969

San Francisco & Portland Steamship Company (a corporation),

Appellant,

vs.

Leggett Steamship Company (a corporation),

Appellee.

No. 2970

BRIEF FOR APPELLEE.

W. S. Burnett,
Thomas A. Thacher,
Denman and Arnold,
Proctors for Appellee.

Filed this.....day of June, 1917.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

San Francisco & Portland Steamship Company (a corporation), owner of the American Steamship "Beaver", *Appellant,* vs. Leggett Steamship Company (a corporation), claimant of the Steam Schooner "Necanicum", her engines, boilers, boats, tackle, apparel and furniture, *Appellee.*	No. 2969
San Francisco & Portland Steamship Company (a corporation), *Appellant,* vs. Leggett Steamship Company (a corporation), *Appellee.*	No. 2970

BRIEF FOR APPELLEE.

Introduction.

FINDINGS OF THE LOWER COURT.

In the consideration of the case at bar, it will unquestionably aid this court to have before it the

opinion rendered by Judge Dooling, and the decree entered by him. The opinion reads as follows:

> "These are cross-actions growing out of a collision between the 'Beaver' and the 'Necanicum' which occurred October 30th, 1913. The 'Beaver' is a passenger steamer of 2,997 net tonnage, and having a length of 380 feet and 57 feet beam. The 'Necanicum' is a steam schooner, 175 feet in length and with a beam of 35 or 40 feet. The 'Beaver', loaded, was coming down, and the 'Necanicum', light, going up the coast, on approximately parallel courses. The former was proceeding at the rate of 14.7 knots and the latter at the rate of 8¼ knots per hour. The atmosphere was foggy, the fog occasionally rising and settling, and being denser at some times than at others. According to the testimony of those on the 'Necanicum', the 'Beaver' was first sighted when about five miles distant, at which time she was a point or two on the starboard bow. The fog then settled and hid her from view until about two minutes before the collision. She was then still on the starboard bow, distant about a half a mile. The 'Necanicum' blew two whistles, denoting the intention to pass starboard to starboard. Instead of doing this the 'Beaver' turned across the 'Necanicum's' bow and the collision resulted. According to those on the 'Beaver', the 'Necanicum' was sighted when about a mile distant, dead ahead, or a little on the port bow. The 'Beaver' then gave a signal of one whistle which was not answered, and in about thirty seconds gave another similar signal, which was answered by one whistle from the 'Necanicum', consummating an agreement that the vessels should pass port to port, but the 'Necanicum', instead of turning to starboard, turned to port, thus bringing them together. Both claim to have been regularly blowing fog-signals, but each denies that the fog-signals of the other were heard. There is in this case, as in all similar cases coming under

my observation, much contradictory testimony as to the events occurring at the time of the collision. But this one fact seems to me to stand out clearly; that the 'Beaver' was gravely negligent in proceeding at the rate of 14.7 knots per hour in the fog, and that *but for such speed, and the resulting momentum due to her size and weight, the collision would not have occurred.** Contradictory as the testimony is, there is nothing therein which tends in any manner to excuse the running of a large, heavy and loaded passenger steamer at such a rate of speed in the fog then prevailing. This speed prevented the rectification, before it was too late, of whatever error arose from confused or contradictory signals.

A decree will therefore be entered fixing the responsibility for the collision upon the 'Beaver', and dismissing the libel of her owners. The other cause will be referred to the commissioner to ascertain and report the damage which the 'Necanicum' sustained.

December 10th, 1915.

M. T. Dooling,
Judge."

The following is a copy of the body of the decree, dismissing the libel against the SS. "Necanicum":

"This cause having been heard on the pleadings and proofs, and having been argued and submitted by the advocates of the respective parties, and due deliberation having been had, the Court now finds:

That the evidence fails to establish that the said steamship 'Necanicum', prior to and at the time of the collision alleged in the libel, did not have a proper and efficient lookout and proper and competent officers, or that she failed to alter her course or conduct herself in accordance with the passing

*Italics ours.

rules or exchange of signals between her and the steamship 'Beaver', or that she failed to stop and reverse at a proper time before said collision; and further finds

That the said collision was not in any way caused or contributed to by any neglect, error, default or misconduct of the steamship 'Necanicum', or her claimant, the Leggett Steamship Company; and further finds

That the said collision was caused by the neglect and misconduct of the steamship 'Beaver' in proceeding in the fog, prior to the collision, at an immoderate rate of speed, while the steamship *'Necanicum' was proceeding at a moderate rate of speed for the conditions then prevailing*;*

It is therefore ordered, adjudged and decreed, that libelant take nothing by its libel herein, and that the said libel be dismissed, and the libelant is liable to the claimant, Leggett Steamship Company, for its costs to be taxed.

Dated, December 13th, 1915.

M. T. Dooling,
Judge."†

In the above opinion and decree, the court set out fully its findings relative to the case, in which testimony covering seven hundred and seventy-one printed pages was taken, twenty-eight witnesses were examined, and a number of trial days consumed. The decree supplements the opinion, and between them practically all material points raised in the case are covered.

---

*Italics ours.

†A substantially similar decree was entered in the case of Leggett Steamship Co., a corporation, Libelant v. San Francisco & Portland Steamship Co., a corporation, Respondent, No. 2970. Under this decree the Leggett Steamship Company was awarded $2372.81. In the libel in the case of San Francisco & Portland SS. Co. v. Leggett SS. Co., it was claimed by appellant in its libel that the "Beaver" was damaged in the sum of $45,000.

I.

THE "NECANICUM", PREVIOUS TO THE COLLISION, DID NOT PROCEED IN A FOG AT AN IMMODERATE SPEED, AND CANNOT BE HELD AT FAULT THEREFOR.

Bearing in mind the findings of the court, we shall now take up the appellant's argument. The principal theory advanced is that if a fog was prevailing, then the SS. "Necanicum" as well as the SS. "Beaver" was at fault and, as a consequence, the damage should be divided. The fault of the "Beaver" is admitted by appellant in no uncertain terms:

> "If fog were prevailing then confessedly the 'Beaver' was at fault for proceeding at approximately full speed, for she was thereby in breach of Article 16 of the International Rules for the prevention of collisions" (Appellant's Brief, 5).

The suggestion, that there was any question as to whether or not there was fog, is obviously without merit. Both the libels and the answers in the cases at bar set forth that a fog prevailed (Record, 8-20). Since all the witnesses present at the collision agreed as to this fact, appellant can hardly claim now that there was no fog. At the outset, therefore, it is admitted that the SS. "Beaver" was in fault at the time of the collision.

That part of Article 16, referred to, reads as follows:

> "Every vessel shall, in a fog, mist, falling snow, or heavy rainstorm, go at a moderate speed, having careful regard for the existing circumstances and conditions."
>
> 26 Stat. at L. 320.

This is the same article which appellant claims the "Necanicum" to have violated. Such a claim is an absolute contradiction to the holding of the lower court, when it found:

> "That the said collision was caused by the neglect and misconduct of the steamship 'Beaver' in proceeding in the fog, prior to the collision, at an immoderate rate of speed, *while the steamship 'Necanicum' was proceeding at a moderate rate of speed for the conditions then prevailing*" (see p. 4, supra).

Appellant alleges that the speed at which the "Necanicum" was proceeding when the vessels came in sight of each other was not moderate under Article 16. The basis of this contention seems to be, not that the "Necanicum" was proceeding at too rapid a speed, but that as a matter of law, as the "Necanicum" was proceeding at substantially her full speed, it could not be said that such speed was moderate within the meaning of Article 16. Our opponent apparently finds itself in a situation where it could not claim, with any likelihood of success, that under "the existing circumstances and conditions" the speed was in itself excessive, since the findings of the trial court, having before it the fullest testimony as to such circumstances and conditions, would undoubtedly be upheld in the appellate court. Hence appellant has developed a theory of Article 16 which can be applied regardless of conditions. To sustain itself in such a theory, appellant cites a number of somewhat antiquated decisions, alleged to show that however slow a vessel may go in fog or mist or snow, and however light the

fog or mist or snow may be, the vessel must go still slower. While for obvious reasons such a theory appeals to appellant, it cannot be said to be in harmony with the law, since the decisions cited in appellant's brief arose not under Article 16 but under a totally different rule.

A study of the cases cited by appellant, together with the decisions of the United States Supreme Court dealing with Article 16 is convincing in showing that there is no such hard and fixed rule, but that:

> "'Moderate speed' is purely a relative term, which means no more than that the vessel must run at a prudent rate of speed. Time, place and circumstance, rather than the swiftness of the vessel over her course, determine whether the actual speed was immoderate, in that it was imprudent."
>
> *Quinette v. Bisso,* 136 Fed. 825 at 830 (C. C. A. 5th).

The Supreme Court of the United States has commented, without approval, on the fact that certain courts have suggested hard and fast rules regarding speed in fogs. Thus in *The Colorado,* 91 U. S. 692, 702, 23 L. Ed. 379-382, (a dense fog case, where the steamer held solely liable was moving ten miles and collided with a bark making four miles an hour), the Supreme Court said:

> "Different formulas have been suggested by different judges as criterions for determining whether the speed of a steamer in any given case was or was not greater than was consistent with the duty which the steamer owed to other vessels navigating the same water, but, perhaps, none yet

suggested is more useful or better suited to enable the inquirer to reach a correct conclusion, than the one adopted by the Privy Council. The Batavier, 40 Eng. L. & E. 25.

"In that case the court say: 'At whatever rate she (the steamer) was going, if going at such a rate as made it dangerous to any craft which she ought to have seen, and might have seen, she had no right to go at that rate.' "

The same court in *The Chattahoochee,* 173 U. S. 540, 548, 43 L. Ed. 801, 805, declared:

"It has been said by this court, in respect to steamers, that they are bound to reduce their speed to such a rate as will enable them to stop in time to avoid a collision after an approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed required by law."

The law was laid down with finality by the Supreme Court in *The Umbria,* 166 U. S. 404, 417, 41 L. Ed. 1053, 1061, as follows:

"The general concensus of opinion in this country is to the effect that a steamer is bound to use *only** such precautions as will enable her to stop in time to avoid a collision, after the approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed required by law."

Ignoring the decisions of the Supreme Court and the decisions in the Circuit Courts of Appeal for the last three decades, appellant seeks to justify its claim that moderate speed means "reduced speed" by certain early cases decided by the United States District Courts between 1883 and 1887.± These cases, decided long

---

*Italics ours.

± The City of New York, 15 Fed 624; The State of Alabama 17 Fed 847; Clan Adams v. P. Co., 20 Fed 635; The Pennland, 23 Fed 551; The City of Atlanta 26 Fed 456. The other cases cited by ap-

before *The Umbria* and *The Chattahoochee,* supra, concerned a rule which was entirely different from the present Article 16, which appellant claims the SS. "Necanicum" violated. An examination of the history of the International Rules will make this clear.*

The first set of International Rules was adopted in 1863, by a British Order in Council, and in 1864 by an Act of Congress. The twenty-first of these rules, as they appear in the Revised Statutes, Section 4233, requires that "every steam vessel shall, when in a fog, go at a moderate speed".

In 1879 a new code was enacted in Great Britain, and in 1885 the same code was adopted in the United States. The twenty-first rule, above referred to, was superseded in this later code by Article 13, which provides that "every *ship* shall, in a fog, *mist or falling snow,* go at a moderate speed"† (23 U. S. Stat. at L. 438).

The set of International Rules with which we are now concerned, however, was adopted still later. Of this last code the United States Supreme Court, in the recent case of *The Beaver* (*Lie v. San Francisco & Portland SS. Co.,* U. S. Adv. Ops., 1916, pp. 270, 271, decided March 6, 1917, affirming the judgment of this court) said:

> "In the year 1889 representatives of over thirty of the maritime nations of the world met in convention at Washington for the purpose of dis-

*These rules are set forth in extenso in Spencer on Marine Collisions § 24.

†The italics indicate the changes in the rule.

cussing the international code of rules to prevent collisions at sea, and of suggesting such changes and modifications as experience had shown to be necessary. The recommendations of this convention were adopted by Act of Congress of August 19, 1890 (26 Stat. at L. 320, chap. 802), became effective by proclamation of the President (28 Stat. at L. 1250) on the 1st day of July, 1897, and have been operative ever since.

Of these rules the following is applicable to the case we are considering:

'Art. 16. Every vessel shall, in a fog, mist, falling snow, or *heavy rainstorm,* go at a moderate speed, *having careful regard to the existing circumstances and conditions.*

'A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.'

The most cursory reader of this rule must see that while the first paragraph of it gives to the navigator, discretion as to what shall be 'moderate speed' in a fog, the command of the second paragraph is imperative that he shall stop his engines when the conditions described confront him.''*

Comparing the rule as it has existed during this period, it will be noted that the atmospheric conditions which call for a moderate rate of speed, have been enlarged not only to embrace conditions of fog but also those of mist, falling snow and heavy rainstorms, and also that the words ''having careful regard to the existing circumstances and conditions'' have been added.

---

*The italics in Article 16, as quoted above are our own, and show the further changes in the rule as compared with the rule as it was adopted in 1885.

The only cases cited by appellant which it could be argued might sustain the rule for which he contends, viz., that there is no such thing as "moderate speed" unless it be also "reduced speed", are cases which arose prior to the adoption of Article 13, supra, by Act of Congress in 1885. At the time of the adoption of Article 13 in 1885, that rule had already been construed as to this very point in the Court of Appeals in England, in *The Elysia,* 4 Asp. N. S. 540; 46 L. T. 840.

The claim had been made that a certain slow sailing ship was at fault in a collision in a fog because she was going at her full speed. The court held such a claim untenable. Lord Coleridge said:

> "There are constructions of this 13th Rule which have been suggested for our consideration, but I think the rule means what it says. It says that a ship, whether a sailing vessel or a steamship, must go at a speed which is perfectly moderate. It says nothing whatever about the capacity of a vessel for speed. If a ship be a slow ship, it does not follow that, because she is going at her greatest speed, which is a slow speed, she is to reduce her speed in proportion to a faster vessel. It is not, if her best speed is moderate, that she must reduce it; but if her speed is more than moderate, she must bring it down to what is moderate. It would, indeed, be very dangerous to lay down any rule as to what is moderate and what is immoderate speed. A moderate speed in the Atlantic Ocean may be immoderate elsewhere. Under the circumstances of this case then, I am of the same opinion as the court below and the Elder Brethren; and I am corroborated in that opinion by the gentlemen who assist us, that the sailing vessel Emily, going at the rate of five knots an hour, was not going at an immoderate speed when the collision with the Elysia took place." (543.)

Lord Cotton said, on the same point:

> "Now, as to the consideration of the 13th rule, I have little to add to what has already been said by my learned brothers. In my opinion the rule does not require that the speed is to be slackened by a naturally slow vessel. If the vessel was going at a moderate speed, it is not bound to go at a less speed. But what is a moderate speed? One cannot exactly define what is a moderate speed. That must depend, not upon the speed of the vessel herself, but upon the position in which she is, whether in a crowded channel or on the open seas, where vessels are not very frequently met, and in my opinion it is not necessary to decide that point in the present case. It might depend upon whether a vessel is rapid in answering her helm or not, but the moderation of the speed must depend upon the circumstances, not upon what is the speed of a vessel naturally, but where she is sailing when there is a fog on." (544)*

---

*It is interesting to note that an examination of the English decisions to date shows that the principle announced in the case of "The Elysia", supra, has been uniformly followed.

The primary question is always the density of the fog, and then all the other elements are considered which bear on the ability of the steamer to bring herself to a stop before reaching what otherwise would be the point of impact, assuming that the opposing vessel is also proceeding moderately as thus defined.

Thus in

"The Counsellor", (1913), page 70,

Bargrave Deane, J., in dealing with a collision between two steamships occurring in a fog in the Bay of Biscay, gave the following as the formula to determine what is a moderate rate of speed in a fog under the existing International Rule:

> "I think a very fair rule to make is this, and it is one which has been suggested to me by one of the Elder Brethren: You ought not to go so fast in a fog that you cannot pull up within the distance that you can see. If you cannot see more than 400 feet you ought to be going at such a speed that you can pull up. If you are going in a fog at such a speed that you cannot pull up in time if anything requires you to pull up, you are going too fast."

The whole subject is exhaustively considered in the case of

"The Campania", (1901) p. 289; 9 Asp. Mar. Cas. 177,

where the English Court of Appeal affirmed the decision of the Admiralty Judge and the opinion of each is reported.

The case last mentioned repudiates, in another form, the arbitrary doctrine urged by the appellant in the case at bar, namely: that a

Since this construction of Article 13 had been made prior to the adoption of that article by Congress, it is to be "presumed that Congress, in adopting the language of the English Act, had in mind the construction given to these words by the English courts and intended to incorporate them into the statute".

Interstate Commerce Comm. v. B. & O. R. R., 145 U. S. 263 at 284.

When, in 1889, the maritime conference above referred to was held at Washington, to revise the then existing International Code, the convention, in order to eliminate any possible doubt, specifically made the term "moderate speed" dependent upon existing circumstances and conditions. This was done by adding to the former rule the words "having careful regard to the existing circumstances and conditions". It is to be noted that the tendency of the changes of what is now the first paragraph of Article 16 has been to insert additional atmospheric conditions, in which moderate speed shall be observed and at the same time to make the moderate

---

moderate speed cannot exist as such under the rule, unless it also be a reduced speed. The court held that, even were it a fact (which it did not concede) that "The Campania" could not with safety to herself and passengers travel at a less speed in a dense fog than nine knots an hour, nevertheless, that this did not exonerate "The Campania" if she was, within the meaning of the principle which is succinctly set forth in "The Counsellor", supra, in fact proceeding at an immoderate rate of speed, which concededly "The Campania" was doing.

In a word, the steamer, as the rule says, must go at a moderate rate of speed. If her full speed is under the circumstances existing, in fact a moderate rate of speed, it is none the less a moderate rate of speed because it is also her full speed. On the other hand, if her slowest rate of speed is in fact greater than a moderate rate of speed, under the circumstances existing, it is none the less an immoderate rate of speed, because it also is her slowest rate of speed. As a practical matter, in the contingency last mentioned, the steamer must either stop until the fog clears, or make headway slowly by stopping the engines at brief intervals of time.

speed to be exercised by the ship dependent upon "existing circumstances and conditions". As our Supreme Court has so recently pointed out, this "gives to the navigator discretion as to what shall be moderate speed in a fog" (*The Beaver,* supra).

On the other hand, we find appellant harking back to an arbitrary rule which never gained currency in the decisions of our courts, and which, as we have pointed out, is contrary to the construction placed by the British courts upon the rule at the time of its adoption in this country in 1885 and is in direct contradiction to the later phraseology of the rule as it has existed for more than a quarter of a century.

Entirely aside from the fact that no court has ever construed Article 16 as appellant has suggested, the weakness of the argument made on behalf of the "Beaver" is apparent from the slightest consideration of the contention made. To sustain itself appellant is urging this court to hold that in all fogs, all mists and whenever snow is falling, whether one can see a mile or ten feet, the speed of all vessels, however slow or small, must be reduced. If this court makes this holding, then in a mist, when visibility extends over a mile and a quarter, a gasoline boat going three miles an hour must cut down her speed, or be held in fault if she is run down by a transpacific liner. It is only natural that appellant, recognizing that its large heavy steamer was plunging through the light fog prior to the collision at the rate of 14.7 knots an hour, should attempt to unload a part of its liability upon the slow unladen "Necanicum"; but granting, as is

apparent, that appellant's case is far from strong, we are surprised that it should attempt to persuade this court to declare that at all times, in all fogs and all mists, however light, all ships, whether they go two or three or twenty-five or thirty knots an hour, must reduce their speed, or be held all equally negligent. The absurdity of such a claim is apparent from its mere statement.*

To strengthen this claim that in all fogs even the slowest ships should go slower, appellant quotes from a number of cases in which vessels traveling through fogs at certain speeds have been held at fault. Of course the degree of speed proper in a fog depends upon the thickness of the fog. There are fogs so dense that one cannot see twenty feet, and fogs so light that one can see for a mile. The fog prior to the "Beaver-Necanicum" collision was of a light variety, since admittedly the vessels when seen by each other were somewhere between half a mile and a mile apart (Record 54, 95, 297, 451, 575, 595).

As the court below found in its opinion "the atmosphere was foggy, the fog occasionally rising and settling and being denser at some times than at others" (supra pp. 2-3).

For appellant to cite cases where the fog was thick to prove that the speed of the "Necanicum" was not

*The extract from Spencer on Marine Collisions (1895) and that from the Amer. & Eng. Ency. quoted by appellant, are merely general statements as to the meaning of the term "moderate" as used in the cases mentioned by appellant and already commented upon. The Am. & Eng. Ency. is careful to state "What is moderate speed must always depend upon the circumstances of each case" (Vol. 25, p. 983). Spencer also declares, at page 130, "The moderate rate of speed required by the rules must depend upon the circumstances of the case".

moderate, is futile. Such cases are manifestly not in point. An examination of the opinions mentioned by the appellant makes this clear.

Case.	Speed.	Condition of Fog.
The Oceania Vance, 233 Fed. 77.	6½ to 7 knots.	"Thick fog." Vessels saw each other within 300 feet (217 Fed. 974).
The Belgian King, 125 Fed. 809.		Fog "dense".
The Michigan, 63 Fed. 280.	5 to 6 "	"Low lying fog": vessels saw each other 400 feet off (283).
The Harold, 84 Fed. 698.	6 "	"Fog was so thick that lights could not be seen for more than a few hundred feet."
In re Clyde SS. Co., 134 Fed. 95.	6 "	Fog "dense".
The Furnessia, 137 Fed. 955 (Aff. 154 Fed. 348).	6 "	"Fog so thick that a light could not be seen until less than ship's length away" (351).
The Tremont, 160 Fed. 1016.	6 miles.	"The fog was so dense that an approaching vessel could not be seen at a greater distance than 100 to 150 feet" (1018).
The Delaware, 213 Fed. 214.	6¼ knots.	"Thick fog."
The Martello, 153 U. S. 64.		Fog at entrance to New York Harbor.
McCabe v. Old Dominion SS. Co., 31 Fed. 234.	7 miles.	Fog "so dense that objects could not be seen through it according to some of the respondent's

Case.	Speed.	Condition of Fog.
		witnesses further than 300 feet, while others estimate the greatest distance at not more than 50 feet''.
The Wyanoke, 40 Fed. 702.	7 knots.	Dense fog, ''when the lights were first seen the vessels were about half a ship length away'' (703).
The Catalonia, 43 Fed. 396.	7 knots.	''Fog so thick that a ship's hull and sails could not be seen more than a ship's length away'' (397).
The Pennsylvania, 19 Wall. 125.	7 ''	''Dense fog''. ''The two vessels were not more than three or four hundred feet apart'' when vessels discovered each other.
The City of Panama, Fed. Cases 2764.	8 miles.	''A very dense fog prevailed. The schooner was not discovered until about half a minute before the collision.
The Westphalia, Fed. Cases 17,460.	8-9 ''	Fog so thick ''vesels 150 to 160 feet'' apart when seen.
The Leland, 19 Fed. 771.	8 knots	''Weather very thick and foggy.'' ''Neither of the crews of these two vessels was aware of the proximity of the other until they were about 300 feet apart'' (772).
The State of Alabama, 17 Fed. 847.	8-8½ ''	First seen 100 yards apart.

The above cases are cited by appellant as the basis for its statement that "the weight of authority thus condemns the speed of the 'Necanicum'" (Appellant's Brief 27). That they are no authority for such a claim is evident. They are practically all cases where the fog was so dense that the objects could be seen only a few hundred feet away. We do not and could not, without incurring well deserved ridicule, deny that a speed of 8 knots in a dense fog is immoderate, but the fog prevailing in the "Beaver-Necanicum" collision was clearly so light that it could just be called "fog" within the meaning of the term under Article 16. Because of the lightness of the fog, it is difficult to find cases in which the speed of vessels under similar circumstances has been considered. Certain cases in which the speeds have been held moderate are, however:

The Allianca, 39 Fed. 476	7 knots.	Snowstorm; ship's lights seen ⅓ to ½ mile.
The Lepanto, 21 Fed. 651.	4½ "	"Dense fog."
The Lorenzo D. Baker, 24 Fed. 814.	4-5 miles.	"The fog was so dense that a vessel could not be seen for more than 100 yards off."
The John Pridgeon, 38 Fed. 261.	4 "	"Densely foggy."

The Supreme Court has said, regarding "moderate speed":

> "While it is possible that a speed of six miles an hour, even in *a dense fog,* may not be excessive upon the open ocean and off the frequented paths of commerce, a different rule applies to a steamer

> just emerging from the harbor of the largest port on the Atlantic Coast, and in a neighborhood where she is likely to meet vessels approaching the harbor from at least a dozen points of the compass."
>
> *The Martello,* 153 U. S. 64, 70; 38 L. Ed. 637, 640.

If five miles an hour is a moderate speed in a dense fog where one can see only a hundred yards, certainly eight to nine miles an hour is not immoderate when one could see 1000 yards. While the above cases are none of them concerned with so light and fitful a fog as that in which the "Beaver" and "Necanicum" collided, all of them are authority for the holding that in such a fog vessels may run at a fair rate of speed. As stated supra, in the cases dealing with Article 16, the meaning of the term "moderate speed" depends on the circumstances in each case, i. e., the exact degree of fog, the sea and weather, the course of the vessels, their ability to stop, etc. In a word, as the Circuit Court of Appeals for the Second Circuit—the appellate tribunal for the court deciding the very cases on which appellant relies*—said:

> "Every case, however, depends upon its own circumstances, there is no precise rate that can be held moderate speed under all circumstances."
>
> *The Bayonne,* 213 Fed. 216 at 217.

On all these matters the lower court necessarily passed in its holding that

> "The 'Necanicum' was proceeding at a moderate rate of speed for the conditions then pre-

*The City of New York, 15 Fed. 624; The State of Alabama, 17 Fed. 847; Clare v. Providence & SS. Co., 20 Fed. 535; The Pennland, 23 Fed. 551; The City of Atlanta, 26 Fed. 456; The Britannic, 39 Fed. 395.

> vailing'' and that as to the ''Beaver'' ''but for such speed and the resulting momentum due to her size and weight, the collision would not have occurred''.

Were this court to hold, however, that the speed of the ''Necanicum'' was not moderate when she was sighted by the ''Beaver'' half a mile away, still the ''Beaver'' must be held solely responsible for the collision because the speed of the ''Necanicum'' cannot be held to have been a proximate cause of the collision. If Article 16 had in fact been broken by appellee, this fact would not make the ''Necanicum'' liable for the collision. In this connection, see *The Clara,* 55 Fed. 1021, decided by the Circuit Court of Appeals for the Second Circuit, where an attempt was made to hold the ''Clara'' partially responsible for the collision. The upper court held the other vessel solely at fault and said:

> ''The more difficult question in the case is whether the Clara is also to be deemed in fault for the collision. The only fault which can be imputed to her is navigating too near the New York shore, in disregard of the state statute which required her to be navigated as near as possible in the center of the river. But she is not to be condemned if her fault was a remote one, and not a proximate cause of the disaster; and the real question as regards her liability is whether her fault was not one of that description. Although she was improperly beyond midriver, she was not so near the shore as to embarrass the Reliance in rounding the Hook if the latter had been properly navigated.'' (Page 1023.)

To the same effect was *The Titan,* 44 Fed. 510; *The Britannia,* 34 Fed. 546; *La Bretagne,* 179 Fed. 286.

As already stated, the lower court specifically finds

> "that the said collision was not in any way caused or contributed to by any neglect, error, default or misconduct of the SS. 'Necanicum', or her claimant, the Leggett Steamship Company".

Here certainly is a square holding by the *nisi prius* court that the SS. "Necanicum", although she was going at over 7½ knots an hour, did not by any error, default or misconduct contribute to the collision.

> "The well settled rule is applicable that the findings of fact of the trial court will not be disturbed in this court unless it clearly appears that there was error. *Whitney v. Olsen,* 108 Fed. 292; *Perriam v. Pacific Coast Co.,* 133 Fed. 140; *The Bailey Gatzert,* 179 Fed. 44."
>
> *The Dolbadam Castle,* 222 Fed. 838, 840 (C. C. A. 9th).

It also falls under

> "the well settled rule which has been followed by this and other courts, that in cases on appeal in admiralty, when questions of fact are dependent upon conflicting testimony, the decision of the District Judge, who had the opportunity to see the witnesses and judge of their appearance, manner and credibility, will not be reversed, unless it clearly appears to be against the weight of the evidence".
>
> *The Hardy,* 229 Fed. 985 at 986-987 (C. C. A. 9th Cir.).

We must therefore examine the record in order to determine whether or not there is substantial evidence to sustain the finding that no fault of the "Necanicum" contributed to the collision. The fault claimed

is the speed of the "Necanicum' when seen half a mile away by the "Beaver". As pointed out, even if the speed of the "Necanicum" was immoderate and hence Article 16 was broken, that breach must be held a contributing cause to the collision before the vessel can be held liable.

To show that there is substantial evidence to sustain the court in its holding that the speed of the "Necanicum" did not contribute to the collision, we need refer to only one part of the evidence. The testimony is that the "Necanicum" could stop herself in 1½ minutes, and that 2½ minutes elapsed between the time when the vessels sighted each other and the collision (infra p. 33).

The testimony of the witnesses from the "Necanicum" is, moreover, that this vessel was making considerable sternway at the time of the collision (infra p. 33). In other words, there is most substantial evidence to support the holding of the lower court that no alleged fault, no speed of the "Necanicum" contributed to the collision with the SS. "Beaver" on October 30, 1913.

II.

THE COLLISION WAS CAUSED BY THE GROSS ERRORS OF THE SS. "BEAVER" WHICH, APPROACHING ON THE STARBOARD SIDE OF THE "NECANICUM" AT A HIGH RATE OF SPEED IN FOG, CROSS-SIGNALLED THE "NECANICUM" AND CROSSED HER BOW.

(a) Comment on Appellant's Brief.

In the second division of its brief, appellant attempts to have the "Necanicum" held liable because of her

alleged course. The courses of the "Beaver" and the "Necanicum" and the distance the two vessels were apart when each was seen by the other, is sought to be proved by certain employees of the SS. "Beaver". These employees, testifying with a harmony in small details which hardly suggests candor, each relate how, when he looked up and saw the "Necanicum" she was either right ahead or a little on the port bow (Mason 293, Ettershank 357, Bryning 449), and about a mile away (Mason 297, Ettershank 358, Bryning 449).

Appellant characterizes (Appellant's Brief, p. 4) Mr. Hewitt as a member in high standing of the Portland, Oregon, bar. Appellant felicitates this court on its good fortune in

> "having the frank and comprehensive testimony of a man of good character and standing, a keen observer, of high intelligence" (p. 55),

and again (p. 57),

> "Mr. Hewitt's description was a most human one by a man of observation, and no possible reason exists for this court refusing to give it full credence."

We will concede that Mr. Hewitt's description is a most human one—"To err is human".

There is nothing in the record which throws any light on the eminence of the gentleman at the Portland bar. As a number of members of that bar from whom we have enquired—to be precise, four of its most representative members—do not know the gentleman even by reputation, we cannot aid this court in throwing light on the exact height of his eminence. The

really pertinent matter in reference to him is that admittedly he was undergoing his first ocean experience (Record 196).

At the time the vessels approached each other, Mr. Hewitt was sitting in a position where the lifeboats and the forward part of the ship completely concealed his view (Record 193). Finally he walked to the port side of the "Beaver" and saw the "Necanicum" (194), then about two hundred yards away (Record 197). At this distance, Mr. Hewitt testified of his view of the "Necanicum":

> "Yes, it was fairly dense, but not one of those blinding fogs. I could see all parts of our vessel, and I could see the other boat there quite plainly, but I couldn't distinguish anything on it; it looked like a large, dark hull sitting out there, you know" (Record 192).

In other words, a thick fog—which testimony is completely at variance with all the pleadings and with the evidence given by every other witness present at the collision. This testimony, in direct contradiction to that given by all other persons present, shows how little Mr. Hewitt, with his complete lack of experience in matters pertaining to the ocean, remembered of the incident. If experience is of any value, Mr. Hewitt's testimony as to his ability to tell the speed of the vessel by how it felt to him (Record 198), etc., is worth but little.

The remarkable fact is that Mr. Hewitt was the only disinterested witness whom appellant saw fit to produce from a large passenger steamer,—and he could

see nothing of the course of the "Necanicum" until she was within two hundred yards (Record 196). It seems very unlikely that, a little after lunch, on a smooth sea, when the fog was very light, there were not a number of passengers on the deck of a large steamer such as the "Beaver". Yet no one except Mr. Hewitt who, from his position, could not see the course of the "Necanicum", was introduced. Surely the captain and the mate of the "Beaver" were sufficiently versed in collision actions to have secured, immediately after the collision, the names of the passengers who saw the "Necanicum" approach. The "Beaver", at the very time of the collision was in the United States courts because in 1910, while running at full speed in the fog, she sank the Norwegian steamer "Selja" (see *The Beaver,* 197 Fed. 866; 219 Fed. 134). Is not the inference obvious that the reason for not securing the evidence of impartial passengers—not employees—as to the position and course of the "Necanicum", must have been that such testimony would have been unfavorable to the "Beaver"?*

Appellant, at considerable length attacks the testimony of Mate Beckwith and Captain Keegan of the "Necanicum". The testimony of the men from the "Necanicum"—from which not a few culled witnesses, but all the men on deck, were produced—was to the

* As to employes we should like to know why the carpenter who admittedly saw the "Necanicum" before Mr. Hewitt (Hewitt, p. 188) was not called? This was one employe on whom partial responsibility for the collision could not be laid.

effect that the "Beaver" was one, two or three points on the starboard side of the "Necanicum" and about ½ a mile away when seen prior to the collision (Record 71, 122, 136, 572, 575, 594). That none of these witnesses were sure just how many points off the "Necanicum" the "Beaver" was is clear from the evidence. Appellant attempts to belittle the testimony of Mate Beckwith because, although he pointed out that he thought the bearing of the "Beaver" was about three points to the starboard, he also said he figured she was half or three quarters of a mile to one side (Appellant's Brief 33). From this statement it is argued that the mate's testimony was unworthy of credence because, had the "Beaver" been as far to one side as three quarters of a mile, her swinging over and covering that distance would seem impossible. We are inclined to agree that the "Beaver" was much nearer one point than three points off the starboard of the "Necanicum". The exact number of degrees off starboard probably would not be specifically remembered by a truthful witness—he would remember little more than that the vessel was far enough off his starboard to enable both vessels to pass with ease had their courses been unchanged. Appellant infers that Beckwith was not truthful. An examination of the record shows that Beckwith was not a fool and, if he had wished to lie, he would not have suggested that the "Beaver" was half a mile to the starboard of his vessel. This clearly was the statement of a mistaken but honest man. Simply because his impression, on being asked a question to which he could

only hazard an answer, was erroneous, appellant seeks to discredit his testimony.

By a similar argument, appellant seeks to discredit the testimony of Captain Keegan. This witness figured the "Beaver" was two points off the starboard side of the "Necanicum" (Appellant's Brief 37), and as a "rough guess", that she might have passed the "Necanicum" about half a mile away. When closely questioned, it became evident that the witness' prediction as to what the "Beaver" might have done was the roughest approximation and meant merely that had the "Beaver" continued her course she would have passed the "Necanicum" at a good safe distance (Record 159 to 163).

We will confess that such testimony is of a very different nature from that given on behalf of appellant, of which the following is a sample:

> "Q. What was the bearing of the 'Necanicum' at the time you first saw her?
> A. Almost ahead, a little bit on the port bow.
> Q. How much on the port bow?
> A. Oh a couple of degrees."
>
> Ettershank, Record 357.

> "Q. What was the bearing of the 'Necanicum' to your vessel at the time you first saw her?
> A. Almost ahead, as far as I can recollect; if anything a shade on the port bow.
> Q. What do you mean by a shade on the port bow?
> A. Well, a degree or two from where I was standing."
>
> Bryning, Record 449.

But, while the testimony of the "Necanicum's" witnesses did not absolutely coincide as to the number of degrees, the "Beaver" was off the "Necanicum", still it is clear that as the "Beaver" and "Nicanicum" came in sight of each other, the "Beaver" was well to the starboard of the "Necanicum". If anything is needed to show the veracity of the "Necanicum's" testimony, it is the circumstances regarding the testimony of Peter Christianson, who was at the wheel of the "Necanicum" at the time of the collision. This man was produced as a witness by appellee (Record 663).

It developed on cross-examination that this witness, after having had a quarrel with the master of the "Necanicum" (Record 673), went to the office of the San Francisco & Portland Steamship Company (Record 672), the owner of the SS. "Beaver".

> "Mr. CAMPBELL. What was your purpose in going there?
> A. As I told you.
> Q. To tell the truth about the case? A. Yes."
>
> Record 673.

From the office of the San Francisco & Portland Steamship Company, Christianson was taken by an employee of that company to the office of its attorney (Record 775). This was the day after a debauch and when he had taken already a good many drinks (Record 775, 776). Yet it is perfectly clear from the cross-examination of that man by appellant's counsel, in which the statements made to that attorney at the interview above referred to, were used against the wit-

ness, that this man never suggested that the "Beaver" when sighted before the collision was not off the starboard side of the "Necanicum". If the "Beaver" was in fact not off the starboard of the "Necanicum" when the vessels first sighted each other, then manifestly the witnesses of the "Necanicum" were testifying falesly. And is it not clear that this witness Christianson, who remained a sailor on the "Necanicum" for a year after the collision, when under the influence of liquor and thoroughly angered with the "Necanicum's" captain and owners, would have known of and promptly told the "Beaver's" counsel, had there been any conspiracy among appellee's employees to make a false situation appear the true one?

The log of the SS. "Beaver" fails to corroborate the story of the employees of that steamship, so remarkably uniform as to details. There are a strange number of erasures and substitutions in the log. The original entries are so well erased as to be undechipherable. So hard, however, was the eraser applied that parts of the lines printed on the pages in question were also erased.*

---

*With the same zeal shown in urging that while the "Beaver" was guilty of speed in a fog, the "Necanicum" was also to blame, appellant urges that "2:20" as the time of collision was "crudely" attempted to be changed to 2:25 by converting the cipher into a 5. Appellant should be more frank with the Court. 2:25 is set beside the words "Collision with stmr. Beaver. Turned back SE½E." The time the new course was taken—when the time would naturally be entered—was undoubtedly about 2:25. No one ever suggested that the time of the collision was later than 2:20. Had the log been changed in order to make it appear that the "Necanicum" was going slower than was the fact, is it not likely that at least the person perpetrating the fraud would have testified that 2:25 was the time of the collision? Moreover, would a person attempting such a "fraud" not have erased the word or figure written over? Certainly one would think that where such fraud is perpetrated or even attempted, those on the vessel whose log has been altered would

The balance of appellant's attacks upon appellee's witnesses seem concerned with such matters as the criticism of a card game in the forecastle. It is difficult to understand why men off duty should not play cards. The claim that the card game should have broken up as soon as the three whistles were heard, seems to indicate that on all occasions when a vessel is not going right ahead the crew should, although off duty, race out on deck. So weak a contention clearly is unworthy of comment.

III.

THE FACTS IN THE CASE.

(a) Speed and Reduction of Speed of Vessels. Space in Which to Manoeuvre.

Appellant's brief is primarily a collection of a few extracts from the eight hundred page record, coupled with considerable abuse of the "Necanicum's" wit-

---

stand by, or at least the person making the alteration would stand by the log, in their testimony, even as to degrees, points, distances, time etc.

As to the effect of an altered log, it is well to note the following extract from The Tillie, Fed. Cases 14,048:

> "If possible, it ought never to happen that a case sought to be supported by a fabricated log book should succeed; and while charges of this kind are not to be listened to unless based upon strong evidence, if they are supported by testimony and remain unanswered on the evidence, they compel an adverse decree."

See also The Sicilian Prince, 128 Fed. 133.

> "It is the universal custom of all vessels to keep a log and the statutes of the United States require them to do so. This requirement is not fulfilled by having a book called a log, in which no entries are made or in which the entries which are made are intentionally meagre, vague and perfunctory, or in which leaves probably containing evidence relating to transactions in litigation are removed. The legitimate inference in all such cases is that if the true facts were entered in the log they would be unfavorable to the vessel."

nesses. On account of the sketchy nature of that brief as a whole, we shall review the evidence with some detail.

The "Necanicum" was proceeding at 8¼ knots and could stop herself in 1½ minutes (Peterson 753) or (averaging the speed from full to stopping at one-half the full) in 618 feet. Allowing the other vessel an equal speed, it would require 1236 feet to stop the two vessels, or less than a quarter of a nautical mile. Presuming the vessels to be half a mile apart, this would allow over 1700 feet for manoeuvering before the vessels even began to reverse. It is submitted that this is not an immoderate speed for the "Necanicum".

The "Beaver" proceeded at 14.7 knots and could stop herself in 2 minutes and 50 seconds, or 1512 feet (Record 348). That is to say, the combined stopping distance, with an opponent going at an equal rate, was over half a mile, and if the vessels were half a mile apart when sighted, they would have no time at all for any calculations or manoeuvres before they began to reverse. It is submitted that ocean passenger carriers are not allowed to so shave their speed calculations, and that 14.7 knots on this day was excessive speed for the "Beaver".

(b) Estimates As to Distance at Which Vessels Were First Seen in Fog Would Place Them Half a Mile Apart, Too Near for a 14.7 Knot Speed.

Emanuelson, Lookout, "Necanicum"	¼ to ½ mile (575)
Keegan, Captain "Necanicum"	½ mile or more (136-137)

Prendergast (Man in lifeboat, "Necanicum")	¼ to ½ mile (594)
Beckwith, mate	About ¾ mile (54)
Oleson, sailor	Less than ½ mile (95)

All three of the "Beaver's" witnesses, Captain Mason, Mate Ettershank and lookout Bryning, place the distance at a mile, and the "Beaver's" log has been altered to show one mile but the presumption is that it was a less distance.

The Tillie, Fed. Cases 14,048 (supra);
The Sicilian Prince, 128 Fed. 133.

Besides, Ettershank clearly told a series of untruths regarding the log (Record 369, 370, 371, 372), and hence his testimony is not credible; and Bryning, while giving a glib and accurate account of occurrences up to the collision, was away off as to all matters he had not discussed with the company's representatives before the trial, that is as to all matters immediately after the collision (Record 456-460). For instance, he says they waited around fifteen minutes before starting, while the engineer's log shows that the vessel *did not stop at all* after the collision. The log read, "2:16 full ast., 2:18 full ahd., 2:19 ahd. slow, 2:20 ahd. full (Record 422). The "Beaver" would pick up her full speed from a stop in one minute.

That the vessels sighted one another when they were about half a mile apart is also apparent from the time in which they were approaching in sight of one another.

(c) The Evidence Shows That About 2½ Minutes Elapsed Between the First Sighting of the "Beaver" and the Collision. This Is One Minute Longer Than It Takes the "Necanicum" to Stop, and 40 Seconds Less Than It Takes the "Beaver".

The uncontradicted incidents on the "Necanicum" are: (1) "Beaver" sighted (claimed on starboard bow); (2) Helm starboarded; (3) Propeller reversed, helm put hard aport; (4) The collision.

"Necanicum's" Witnesses:

Clemens, Second Officer, says log line pointing forward before collision (397); reversing over 1½ minutes (393, 397);

Clough, engineer on watch, reversing 2 minutes from 2:16 (616);

Prendergast, reversing 1½ to 2 minutes (591);

Slater, chief engineer, about 2 minutes (644);

Christensen, at wheel, 1½ to 2 minutes (664);

Olsen, says she had sternway before the collision, saw water from wheel at one-third ship's length from stern (99); takes 1½ minutes (Peterson, 753);

Captain Keegan says she had sternway 45 seconds before the collision (153); only 10 seconds between first order to starboard and hard aport (120);

Christensen says the "Necanicum" had turned a point and a half between order to starboard and to port (663);

Prendergast says (30 seconds between starboard and hard aport orders) time from first seeing "Beaver" till collision less than two minutes (603);

Beckwith says between 2 and 3 minutes between time saw "Beaver" and collision (33).

"Beaver's" Estimates as to Time:

Townsend, "Beaver's" chief engineer, walked as fast as he could 60 feet on main deck, rose 8 foot stairs and walked 70 feet on hurricane deck between the "Beaver's" three whistles and the collision (428-431). This would take *less than fifty-five seconds* at an ordinarily brisk pace. The three whistles were blown at the same time that the captain telegraphed to reverse. For good measure let us allow a minute.

Before reversing, Ettershank says, the vessel ported for half a minute (358), then hard aport for 15 seconds (376), or about 1 minute and 45 seconds from the first whistle to the collision.

Roffler, the man at the wheel on the "Beaver", says the whole time between the "Beaver's" first whistle and the collision was less than a minute (477), the fog shutting in very thick when Ettershank called Mason, and continued so until the collision (479).

Townsend says there were 2 one blast signals from the "Beaver" 15 seconds apart (423), and three blasts in 15 seconds (426), or one minute and thirty seconds from the first whistle to the collision.

The "Beaver's" log, written up from the mate's notes made after the collision (389), shows four minutes from 2:14 to 2:18 between sighting the "Necanicum" and the collision, but 2:14 appears to have been altered from 2:16.

(d) "Beaver in Fault for Porting Helm and Turning to Her Starboard Towards the "Necanicum".

Each vessel was on the other's starboard bow.

"Necanicum's" Witnesses:

Emanuelson, lookout, "Beaver" 1 to 2 points on starboard bow (572);

Beckwith, mate, "Beaver" about 3 points on starboard bow (54);

Keegan, Captain, "Beaver" 2 points on starboard bow (119);

Prendergast (in lifeboat), "Beaver" 2 points on starboard bow (589);

Clemens, 2nd mate, "Beaver" well on starboard bow (410);

Olsen (working on deck), "Beaver" 3 points on starboard bow (94);

Ottenhauser (came out from forecastle), "Beaver" all of 2 points on starboard (634).

None of these witnesses, save Beckwith and Prendergast could see the "Beaver" dead ahead, as she was light forward and the elevation of the forecastle shut off their view (119).

(e) "Beaver" Must Have Had "Necanicum" on Her Starboard Hand As Collision Came After "Beaver" Had Run for 2½ Minutes, Turning Rapidly to Her Starboard.

We have shown, supra, the "Beaver" not reversing over a minute. Presuming she was under a port held for ½ minute and hard aport helm for half a

minute, and then hard aport with reversing for a minute, she must have turned in a curving course to her starboard at least six points.

Ettershank, of "Beaver", 4 points in little over minute reversing (385);

Seike, of "Beaver", 4 to 4½ points in 1 minute 20 seconds (768);

Rinder, 4 points in 1 minute 5 seconds (730);

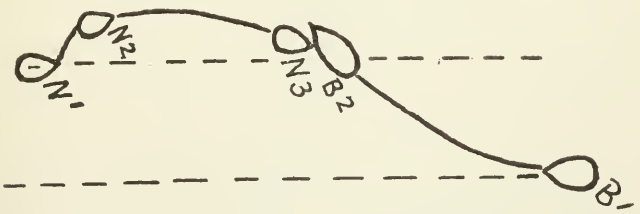
Mason, the "Beaver" would turn clear around in 4 minutes (349);

Mason, she would turn rapidly to starboard under the conditions of that day (332-333).

The "Necanicum", a much slower vessel, at first turned to her port under a starboard helm (663), but this did not continue over 30 seconds and at most she could not have turned over 2 points (667) from her course, that is from NW½W to somewhere just below W NW. With the reversing of her right handed propeller, which turned the vessel to her starboard, for about 2 minutes, helped by a hard aport helm, the "Necanicum" turned back much more than she went to her port. In 1½ minutes reversing, with a hard aport helm, she would turn 3½ points (Peterson, 753), and supposing two minutes reversing, it would reach 4 points (Keegan, 174), or bringing her around to N NW. This was about what she pointed at the time of the collision (Keegan, 174).

The scars on the "Beaver" clinch this, as after the "Beaver" had turned at least 6 points, she was

struck at an angle of 40 to 45 degrees. The "Necanicum", to strike her at this angle, must have turned back to her starboard at least 2 points more than she turned to port, while it is uncontradicted that the "Beaver" was turning continuously to her starboard, most of the time with a hard aport helm, until the collision. Since the vessels came together after the "Beaver" had been turning to her starboard for a much longer time, and at a much greater speed than the "Necanicum", it follows that she must have travelled to a much greater distance to her starboard than the "Necanicum" to her port. As they started on practically parallel courses, it also follows that the "Beaver" must have started from a point to the "Necanicum's" starboard.



The turning of the "Beaver" to her starboard was fault, and the "Necanicum's" two whistle signal was proper.

(f) The "Necanicum" Was at Least at a Standstill at the Time of the Collision.

The "Necanicum" had been reversing for about two minutes (supra), and could stop herself in a minute and a half (Record 753). Her log line on the

port side was pointed forward at the moment of impact (Clemens 397). The water from her propeller on the starboard side ran forward a third of the length of the vessel. The listing, if any, of the "Beaver" was due to the "Beaver's" driving her flare on the "Necanicum's" bow just as a ferry boat lists when striking the wharf. Attorney Hewitt was the only person who particularly noticed her list. It is astonishing that all of the other persons on the "Beaver" who were introduced as witnesses should not have been carefully interrogated on this point.

(g) "Beaver" Had Headway of About 8 Knots at the Time of the Collision.

The testimony is that the "Beaver" could not have been reversed more than one minute (supra). In one minute she would have lost 7 knots on a 15 knot headway (Dickie 508). This would make her speed at the time of the impact about 8 knots an hour. The force of the blow to the "Necanicum" is shown by the fact that several men were knocked down, the tanks were set forward, the rudder stock was smashed and the 4 x 4 iron tiller was bent (Record 215). The "Beaver" furthermore, at the time of the collision, had foam under her bow.

(h) The "Necanicum" Received Two Thrusts, One a Scraping, Turning Her Hard Aport, and the Other a Drive Back When Her Bow Caught on the Strong Transverse Beams of the "Beaver".

The scratches on the "Beaver's" side show she scraped the "Necanicum" before finally engaging her

(Pillsbury 226). This would turn her head to port and stern to starboard and drive the rudder, which was on a port helm, and hence drawn towards the starboard side (Record 733), back towards amidships. This was followed by the driving of the "Necanicum" directly astern when she came up firmly into the "Beaver" and, as a result of which the rudder was driven back to starboard and the tiller struck the block and bent forward (Record 794).

The effect of the first motion was to pull the wheel out of the hands of the helmsman, who was holding the helm to port and throw him from the starboard to the portside of the wheelhouse. The effect of the second blow was to reverse this and spin the wheel around in the opposite direction (Christianson 665). The bend in the tiller showing the rudder to have been on the starboard side corroborates therefore the appellee's testimony that the helm was ported during the reversing of the "Necanicum".

(i) Attorney Hewitt's Drawing.

This drawing (Lib. Ex. 1, Def. Hewitt) clearly disproves the contention of appellant as to the courses of the ships. There is no question that the "Beaver" was going ahead and to her starboard with considerable speed. (1) The "Necanicum" in order to collide with the "Beaver" would, under this drawing, have to chase her—an impossibility. (2) If the "Necanicum" should have increased her speed so as to catch up with the "Beaver", she would have to turn to her port and the angle of striking the "Beaver" would be

from the "Beaver's" aft forward, instead of from forward aft, at 45° as all the witnesses and the exhibits agree. (3) If the "Necanicum" was reversing and necessarily turning to her starboard with the "Beaver" doing the same thing, the vessels could never come together from the position or the angle shown. During the year after the collision, Mr. Hewitt had confused what he saw at the moment of collision with what preceded it.

(j) "Necanicum's" Lookout Not Negligent.

Emanuelson says the reason why he did not report the "Beaver's" one whistle cross signal to the "Necanicum's" two blasts was because the "Necanicum" at once blew three whistles, showing that the bridge officers knew of it and were reversing to meet the emergency thus created (Record 583). His reporting would have been useless, and his failure to do so has no causative relation to the collision.

(k) No Fault in Captain Keegan Taking Command From Mate Beckwith and Giving Reversing Order With Hard Aport Helm.

Christiansen is reported to have said that Keegan asked him not to say that he had given a hard aport order when he was reversing the "Necanicum". We cannot see any motive for such a request. If the hard aport order had not been given, the "Necanicum" would not have turned so much to her starboard but would have gone further on, and the "Beaver" would

have rammed her and sent her to the bottom, just as she did the "Selja". Porting helped the turning to starboard caused by the "Necanicum's" reversing. It was the only thing to do, and if it had given the "Necanicum" *only ten feet more of a turn to her starboard* would have avoided the damage, as at most it would have been but a glancing blow from contact of the round of the bow of each vessel.

IV.

BURDEN OF PROOF.

In considering the circumstances regarding the collision of the "Beaver" and the "Necanicum", the court should bear in mind the failure of the "Beaver" to stand by the "Necanicum" after the collision. That she did not stand by is manifested primarily by her log, which reads "2:16 full astern, 2:18 full ahead, 2:19 ahead slow, 2:20 full ahead".

This was in defiance of Section 1 of the Act of September 4, 1890, ch. 875, which reads:

> "(Sec. 1.) (Duty of masters of vessels in case of collision.) That in every case of collision between two vessels it shall be the duty of the master or person in charge of each vessel, if and so far as he can do so without serious danger to his own vessel, crew, and passengers (if any), to stay by the other vessel until he has ascertained that she has no need of further assistance, and to

> render to the other vessel, her master, crew and passengers (if any) such assistance as may be practicable and as may be necessary in order to save them from any danger caused by the collision, and also to give to the master or person in charge of the other vessel the name of his own vessel and her port of registry, or the port or place to which she belongs, and also the name of the ports and places from which and to which she is bound. If he fails so to do, and no reasonable cause for such failure is shown, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect, or default."
>
> 26 Stat. at L. 425.

The reason why the "Beaver" did not stand by the "Necanicum" is alleged to be that the "Beaver" saw the injuries to the "Necanicum", considered them slight and ordered the "Beaver", therefore, ahead. In this connection we would ask the court to examine claimant's exhibit C, which is a photograph showing the injury to the stern of the "Necanicum" and would further ask the court how any person seeing that injury and seeing how close it was to the water line, could callously say that there was no danger of disaster to the "Necanicum" after the collision. As to the effect of the failure to regard the statute, requiring vessels to stand by, we will cite the clear statement of the Circuit Court of Appeals for the Fourth Circuit:

> "We construe this statute to mean that, if a master of a vessel that has been in collision with another fails to stay by her and shows no reasonable cause for such failure, the law will presume

> that the collision was caused by some negligent act or omission on his part, and, in the absence of proof to the contrary, will fasten upon him the responsibility of the collision. It puts upon him the burden of showing that he was free from fault. It assumes that one who fails to offer assistance to those whose distress is caused by him is presumably at fault in the act which caused the distress, and it denounces pain and penalties against his inhumanity, and holds his ship responsible for the pecuniary fine, but it does not condemn him without a hearing. The obligation imposed is not unqualified, it is carefully guarded by conditions, it permits presumptions to be rebutted by proofs, and it is 'only in the absence of proof to the contrary' that his responsibility is made absolute." (Though the court here found affirmatively that the vessel was not in fault.)
>
> *The Hercules,* 80 Fed. 998 at 1001.

See also

> *The Williamsport,* 186 Fed. 184 at 191;
>
> *The Lucerne,* 148 Fed. 133.

Under this statute, it is evident that the "Beaver" must affirmatively excuse herself from all fault or she will be held liable for the collision.

The lower court, after carefully considering the facts in this case, having weighed the evidence given before it by the witnesses for both vessels, having in mind the character and demeanor of the witnesses from both vessels, and on these facts having found for

the appellee, it is submitted that this court should affirm the judgment of the court below.*

Dated, San Francisco,
June 4, 1917.

Respectfully submitted,

W. S. Burnett,
Thomas A. Thacher,
Denman and Arnold,
Proctors for Appellee.

* It is noted that appellant, on page 61 of his brief, urges that if this court find that fog prevailed, it simply reverses the decree in the action brought by the San Francisco & Portland SS. Co. with instructions to enter a decree in favor of that company. As pointed out on page 5 of this brief, all the pleadings admit a fog, and the evidence of all persons at the scene of the collision bear this out. Since appellant on page 5 of its brief stated "if fog was prevailing, then confessedly the 'Beaver' was in fault", it cannot possibly claim that appellee is wholly responsible for the damage to the "Beaver". Yet disregarding the most elementary rule of admiralty practice, appellant at the close of its brief urges that the owners of the "Necanicum" be compelled to pay for all the damage sustained by the "Beaver".